

IN THE
SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

No. **77-7012**

CLIFFORD R. COMBS,
Petitioner,

-vs-

STATE OF MISSOURI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

CLIFFORD R. COMBS,
Petitioner,

LEE M. NATION,
JAMES W. FLETCHER,
Assistant Public Defender

Office of the Public Defender
1305 Locust Street, Suite 20
Community Justice Center
Kansas City, Missouri 64108
(816) 474-5811

Counsel for Petitioner

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TABLE OF CITATIONS

CASES:

Taylor v. Louisiana, 419 U.S. 522 (1975).
Hoyt v. Florida, 368 U.S. 57 (1961).
State v. Billy Duren, 556 S.W.2d 11 (Mo. banc 1977).
State v. Gethers, 227 S.E.2d 832 (Ga. App. 1976).
Robinson v. Kimbrough, 540 F.2d 1264 (5th Cir. 1976).

STATUTES:

Sixth Amendment, United States Constitution
Fourteenth Amendment, United States Constitution
Article I, § 22(b), Missouri Constitution
§ 497.130, Revised Statutes of Missouri
New York Judiciary Law § 542(7)
Conn. Gen. Stat. Rev. § 51-218, -219
Ga. Code Ann. § 59-112(6)
La. Stat. Ann. § 13-3055
Okla. Stat. Ann. Title 38, § 28
R. I. Gen. Laws Ann. § 9-9-11
Utah Code Ann. § 78-46-10(14)

PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

Petitioner, Clifford Combs, prays that a writ of certiorari issue to review the judgment and opinion of the Missouri Court of Appeals entered in the above-entitled case on February 27, 1978.

OPINION BELOW

The opinion and decision of the Missouri Court of Appeals is reported at 564 S.W.2d 328. A copy of the opinion appears in Appendix A attached hereto.

JURISDICTION

The opinion and judgment of the Missouri Court of Appeals was entered February 27, 1978. Thereafter, a motion for rehearing was filed on March 14, 1978. See, Missouri Rule of Court 84.17. The motion was overruled April 3, 1978. An application to transfer the cause to the Missouri Supreme Court was filed April 18, 1978. Missouri Rule of Court 83.03. On May 9, 1978 said application was denied by the Missouri Supreme Court, making the opinion of the Court of Appeals the final judgment of the highest court in the State of Missouri.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257 (3).

QUESTION PRESENTED

WHETHER MISSOURI'S STATUTORY AND CONSTITUTIONAL SCHEME FOR THE SELECTION OF PETIT JURORS -- WHICH GRANTS WOMEN AN AUTOMATIC EXEMPTION BASED SOLELY ON SEX -- DENIED PETITIONER HIS RIGHT TO TRIAL BY JURY AND DUE PROCESS OF LAW AS MANDATED AND INTERPRETED BY THIS COURT'S OPINION IN *Taylor v. Louisiana*, 419 U.S. 522 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution:

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,"

Fourteenth Amendment

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

Petitioner, CLIFFORD COMBS, was charged by information with the crimes of Burglary, Second Degree and Stealing (\$560.110 R.S.Mo.). Jury trial was held in the Jackson County, Missouri Circuit Court (Murphy, J.) in Kansas City, Missouri. Verdicts of guilt were returned and Petitioner was sentenced to serve concurrent four-year terms in the Missouri Division of Corrections.

HOW FEDERAL QUESTION
IS PRESENTED

1. Prior to trial, Petitioner filed a motion to quash the jury panel on the basis that women were systematically excluded from jury service. In support of this motion, petitioner introduced into evidence a stipulation of facts entered into by both the defense and the State. Briefly, the stipulation outlined the jury selection system used in Jackson County, Missouri, which is as follows: potential jurors are randomly selected from the Jackson County voter registration lists; these persons are sent questionnaires to determine their eligibility for jury service. By statute, this questionnaire prominently states:

TO WOMEN:

The Constitution permits women to elect to serve or not to serve as jurywomen. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service.

This paragraph is immediately followed by a signature line. Those questionnaires returned showing no exemption were placed in the jury wheel. Also stipulated to was the fact that the 1976 jury wheel was 29.1 % female. Each week, names are randomly selected for jury service; these persons are then sent a summons for jury service. This summons reads on its reverse side:

Women, if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible.

Petitioner introduced statistics relating to the number of jurors summoned, and those actually appearing for service, during the months of January through June, 1976. Additionally, the stipulation showed that of 30,165 women sent questionnaires (for the 1976 jury wheel), fully 21,884 (72.6%) indicated an unwillingness to serve as jurors by signing the line under the last paragraph of the questionnaire, which informed them of their ability to refuse to serve because of their sex. Lastly, census evidence was introduced showing Jackson County to be 54% female. An example of the stipulation and its supporting documents is attached hereto as Appendix B and made a part hereof by reference.

At the close of Petitioner's presentation of evidence on the Motion, the State offered no evidence and the Motion was overruled.

2. Subsequent to his trial, petitioner filed a timely motion for new trial alleging the instant allegation. A timely appeal was then prosecuted to the Missouri Court of Appeals, Kansas City District, which affirmed petitioner's conviction by opinion dated February 27, 1978. Motion for rehearing was overruled April 3, 1978. Application to transfer the cause to the Missouri Supreme Court was denied May 9, 1978. The issue raised herein was raised and argued before the trial court and the Missouri Court of Appeals, whose opinion has now become the final judgment of the Missouri Supreme Court with the denial of the application to transfer. Missouri Rule of Court 83.03.

REASONS FOR GRANTING
THE WRIT

The opinion and decision of the Missouri Supreme Court in the instant case is in direct conflict with past decision of this Court, various federal courts of appeals and several state high courts. Specifically, Petitioner contends the instant opinion is in conflict with *Taylor vs. Louisiana*, 419 U.S. 522 (1975) and thus, cannot stand. *Taylor* held Article VII, Section 41 of the Louisiana Constitution and Article 402 of the Louisiana Code of Criminal Procedure (since repealed) violative of *Taylor's* due process rights guaranteed by the XIV Amendment to the United States Constitution.

The Louisiana law is reproduced here for the convenience of the Court:

Article VII, Louisiana Constitution

§41. Selection of jurors; women jurors; trial by judge; trial by jury.

The Legislature shall provide for the selection and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

Louisiana Code of Criminal Procedure

Article 402. Service of women as jurors.

A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service.

The United States Supreme Court in *Taylor* re-examined the question of automatic exclusion of women from the juries previously decided by that Court in *Hoyt v. Florida*, 368 U.S. 57, 7 L.Ed.2d 118, 82 S.Ct. 159 (1961) and they reached a different result. Accordingly, the Court stated:

"Accepting as we do however, the view that the VI Amendment affords the Defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community, we think it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions based solely on sex if the consequences are that criminal jury venires are almost totally male."

(42 L.Ed.2d 690 at 702) [emphasis added]

The question presented herein then whether Missouri offers an "automatic exemption based solely on sex" and if, "the consequences are that criminal jury venires are almost totally male."

The Missouri Constitution, Article I, Section 22(b) states: "No citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption therefrom before being sworn as a juror." This Article is implemented by Section 497.130, Missouri Revised Statutes (1974), which section allows women to "elect to serve or not to serve as jury women."

When placed side by side and examined, the Missouri system and the Louisiana system (later changed) both offer an absolute exemption to jury service based strictly upon gender. The difference being only that in Louisiana the woman must affirmatively opt for service while her Missouri sister must affirmatively choose not to serve.

The Appellant's argument is much better stated by the United States Supreme Court's final paragraph in the *Taylor* opinion:

". . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."

Petitioner concludes that "(t)he States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions. . ." *Taylor v. Louisiana*, at 538. Petitioner, however, does not believe that a blanket exemption for women is a reasonable exemption. Indeed, as pointed by Mr. Justice Seiler in his dissenting opinion in *State v. Billy Duren*, 558 S.W.2d 11, 24, n.2 (1977):

"The federal court (the United States District Court for the Western District of Missouri) provides for excuse on request by a woman charged with care of minor children without adequate domestic help."

Petitioner maintains that this is a reasonable exemption for women and would not serve to deny an accused his constitutional right to a representative jury: in the federal court in Kansas City, 53% of the persons on jury wheel are women and 39.8% of the actual jurors chosen were women. 556 S.W.2d at 24. This data can be contrasted with the Missouri courts: 29% of the persons on the wheel are women; seldom over 15% of the persons appearing for jury service are women; and often, as in the case-at-bar, juries are all male.


Since *Taylor*, several states have been faced with challenges to exemptions to women. All, except Missouri, have changed the exemption by either statute or court decision, see, e.g. *State v. Gethers*, 227 S.E.2d 832 (Ga.App.1976); *Robinson v. Kimbrough*, 540 F.2d 1264 (5th Cir.1976); *New York Judiciary Law* 549(7); *Conn. Gen.Stat.Rev.* §51-218, 219; *Ga.Code Ann.* §59-112(6); *La.Stat. Ann.* §13-3055; *Okla.Stat. Ann.* Title 38 §28; *Rhode Island Gen.Laws Ann.* §9-9-11; *Utah Code Ann.* §78-46-10(14). Missouri remains the only state with an automatic exemption for women. Further, this exemption causes gross underrepresentation of women on jury panels. (See attached exhibits as to the women appearing for jury service). The instant opinion cannot stand as a correct interpretation of this Court's opinion in *Taylor*. Unlike the Missouri Supreme Court, Petitioner does not believe *Taylor* stands for the proposition that any percentages of women on jury panels, higher than those found in *Taylor*, is constitutionally permissible; instead *Taylor* condemns jury mechanisms which deny an accused his right to a jury drawn from a reasonable cross-section of society. The Missouri jury selection system is of such a breed: Petitioner's panel (10% women) cannot be considered as representative of society.

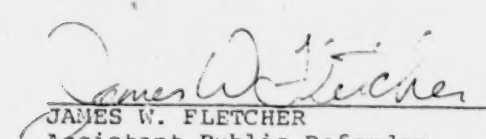
Accordingly, a Writ of Certiorari should issue to review the opinion of the Missouri Supreme Court affirming Petitioner's conviction.

CONCLUSION

WHEREFORE, Petitioner respectfully requests this Court to issue a Writ of Certiorari to the Missouri Supreme Court.

Petitioner


LEE M. NATION
Assistant Public Defender
Office of the Public Defender
1305 Locust Street, Suite 202
Community Justice Center
Kansas City, Missouri 64106
(816) 474-5811


JAMES W. FLETCHER
Assistant Public Defender
Office of the Public Defender
1305 Locust Street, Suite 202
Community Justice Center
Kansas City, Missouri 64106
(816) 474-5811

Counsel for Petitioner

APPENDIX A

OPINION RENDERED BY THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT, ON FEBRUARY 27, 1978.

APPENDIX A IS THE OPINION OF THE COURT
IN STATE OF MISSOURI V. COMBS AND CAN BE
FOUND AT 564 S.W.2d 328. IT HAS NOT BEEN
FILMED HERE.

APPENDIX B

STIPULATION ENTERED INTO BY PARTIES AND DOCUMENTS

IN THE CIRCUIT COURT OF MISSOURI, SIXTEENTH JUDICIAL CIRCUIT

STATE OF MISSOURI,)
)
 Plaintiff,)
)
 v.) Docket
) Division No.
)
) No.
 Defendant.)

STIPULATION

Comes now the defendant, by counsel,
 , Assistant Public Defender, and the state,
 by counsel, Assistant Prosecuting Attorney,
 and stipulate and agree as follows:

1. All persons summoned for jury duty in the year 1976,
 including the persons summoned as prospective jurors in this case,
 were selected from a jury wheel created in the following manner:

- a. Under the direction of the Circuit Court Administrator and the Jury Commissioner, the Department of Court Computer Services created a computer data file containing the name, address, sex and ward/precinct number of every fourth registered voter in Jackson County, Missouri, in the records of the Kansas City Board of Election Commissioners and the Independence Board of Election Commissioners. An Official Notice and Questionnaire in the form prescribed by Section 497.130 of the Missouri Revised Statutes was mailed to each person whose name was selected from the aforesaid list of registered voters.
- b. Completed questionnaires were received in return mail by employees of the Department of Court Computer Services. The questionnaires are scrutinized to determine if any of the responses shown on the questionnaire indicated that that person was entitled to exemption or to be excused from jury duty. The names of those persons who appeared to be entitled to exemption or to be excused from jury duty were then removed from the role of those persons who were sent questionnaires. The list of remaining names constitutes the jury wheel of 1976.
- c. Attached hereto as Exhibit "A" is a copy of a "Summary of Questionnaire Processing for the 1976 Jury Wheel" prepared by Robert J. Kramer, Director of Computer Services, which is a summary of the number of questionnaires processed in the compilation of the 1976 Jury Wheel for Jackson County, and said Exhibit "A" may be admitted in evidence in this case.

- d. Attached hereto as Exhibit "B" is a copy of a memorandum showing the number of males whose names are included in the 1976 Jury Wheel for Jackson County and the number of females whose names are included in the 1976 Jury Wheel for Jackson County. Exhibit "B" and the information shown in that exhibit may be admitted in evidence in this case.

2. Prospective jurors are summoned as follows:

- a. Prior to the week for which potential jurors are to be summoned, the presiding judge and the jury commissioner determine the number to be summoned. This number is provided to the Department of Court Computer Services which uses a computer programmed to randomly select the designated number of potential jurors from the 1976 Jury Wheel. The persons so selected are mailed a jury summons identical to the form of summons attached and marked Exhibit "C", which exhibit is hereby incorporated by reference.
- b. Attached Exhibit "D" (pages 1 through 7), which exhibit is hereby incorporated by reference, is an analysis of the sex and service of potential jurors summoned for each jury week in 1976 through the week of July 26, 1976. The figures contained in Exhibit "D" may be admitted in evidence in this case.

3. On February 4, 1976, the Office of the Public Defender for the Sixteenth Judicial Circuit was authorized to obtain from the Jackson County Circuit Court Administrator all "Official Notice and Questionnaire" forms which were received, processed and used to compile the 1976 Jury Wheel for Jackson County. On February 11, 1976, the Office of the Public Defender received all such questionnaires from the Office of the Circuit Court Administrator.

The questionnaires were so sorted to separate those sent to males from those sent to females. Questionnaires sent to females were sorted to determine the following information and counted in each category thereby obtaining the following totals:

<u>Category</u>	<u>Total Number of Questionnaires</u>
Information on the face of the questionnaire showing that the woman was no longer a resident of Jackson County, Missouri.	817
Female government employees who indicated they would not serve	21
Female professionals, including clergy, who indicated they would not serve	93

Females who indicated prior jury service on the questionnaire (Line 12) but indicated they were willing to serve	132
Females who indicated prior jury service but were unwilling to serve	20
Female teachers who indicated they would not serve	437
Questionnaires indicating that the addressee was in a nursing home	50
Questionnaires indicating in Line 11 that the woman was physically unable to serve or some other written indication of physical infirmity such as loss of hearing, or who indicated they were ineligible under the statutes	1,106
Questionnaires showing that the woman was over 65 years of age and with no affirmative indication of willingness to serve	2,059
Questionnaires showing that the woman was under 21 years of age	151
Questionnaires returned with the notation that the addressee was deceased	53
Questionnaires indicating that the woman declined to serve for no other apparent reason than the female exemption	21,884
Questionnaires with affirmative indications that the woman would serve, or without any indication of refusal	3,342

4. The Court may take judicial notice of the Department of Commerce, Bureau of Census, statistics contained in attached Exhibit "E", which exhibit is hereby incorporated by reference, entitled "General Population Characteristics."

Date

Assistant Prosecuting Attorney
Jackson County Courthouse
415 East 12th Street
Kansas City, Missouri 64106
Counsel for Plaintiff

Date

Assistant Public Defender
1802 Traders Building
1125 Grand Avenue
Kansas City, Missouri 64106
474-5811
Counsel for Defendant



CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

415 EAST 12TH STREET

KANSAS CITY, MISSOURI 64106

AUSTIN E. VAN BUSKIRK
COURT ADMINISTRATOR

December 29, 1975

ROBERT J. KRAMER
DIRECTOR OF COMPUTER SERVICES
816-881-3558

To: Austin E. Van Buskirk
Court Administrator

Re: 1976 Jury Wheel

Attached is the summary of questionnaire processing for the 1976 jury wheel. As you can see, the new wheel will contain a total of 27,868 names. If you need further explanation of the attached summary, please let me know.

Robert J. Kramer
Robert J. Kramer
Director of Computer Services

RJK:bf

cc: John Fitzgerald

D EXHIBIT 51

AUG 18 1976

MAE RYALS

Exhibit
"A"

SUMMARY OF QUESTIONNAIRE PROCESSING
FOR THE 1976 JURY WHEEL

Approximate Registered Voters	<u>260,813</u>
Questionnaires Mailed (1/4 voter rolls)	65,207
Deceased and/or Non-Deliverable	2,451
Ineligible/Elected Not To Serve	<u>34,888</u>
Total Records Removed From File	<u>37,339</u>
1976 Jury Wheel	<u>27,868</u>
Changes to File	
Name Changes	167
Address Changes	<u>2,141</u>
Total Changes	<u>2,308</u>
Total Questionnaires Returned	<u>57,457</u>
Number of Questionnaires Not Returned	<u>7,750</u>

MEMORANDUM

June 15, 1976

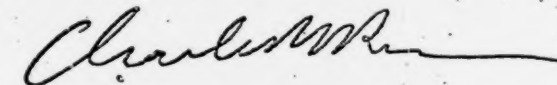
TO: Thomas M. Larson
FROM: Charlie Rogers
RE: Jury Wheel Count

I counted the males and females on the Jackson County Jury Wheel List for 1976, and obtained the following results:

Males	19,755
Females	<u>8,099</u>
Total	<u>27,854</u>

This figures out to slightly less than 29.1% of the persons on the jury wheel list who are female.

I spent a total of 13 hours on this project.



Charles M. Rogers
Certified Law Intern

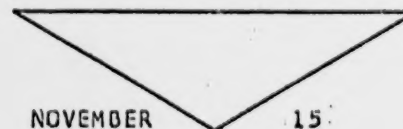
Exhibit
"B"

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Summons for Jury Service

YOU ARE HEREBY SUMMONED to appear before the Honorable
PAUL E. VARDEMAN, Judge of DIVISION 03 of the
Circuit Court of Jackson County, Missouri IN KANSAS
CITY AT 12TH & OAK IN RM 301, ON MONDAY THE 15
day of NOVEMBER, 1976 AT 8:15 o'clock AM to serve as a
juror until discharged.

IF YOU FAIL TO APPEAR YOU MAY BE HELD IN CONTEMPT OF COURT
BRING THIS SUMMONS WITH YOU. JOHN R. FITZGERALD
PLEASE READ THE INSTRUCTIONS ON REVERSE SIDE. Jury Commissioner
(OVER)



NOVEMBER 15

PLEASE BRING THIS ENTIRE CARD WITH
YOU WHEN YOU APPEAR AT THE JURY
ASSEMBLY ROOM.

INSTRUCTIONS

Please note the Judge and location on the front side of this card. You must report to him on the day and at the time specified.

No male juror shall be excused from service except for sufficiently valid reasons to be APPROVED BY THE JUDGE or upon PERSONAL APPEARANCE BEFORE SAID JUDGE AS SHOWN ON THE FRONT OF THIS CARD. Applications for excuses must be presented to said Judge on or before 12 o'clock noon on the Thursday preceeding the date which you are to appear as shown on the reverse side.

A physically disabled juror must show that to appear and serve would endanger his health. Such proof must be in the form of a doctor's certificate and be presented to the Judge the same as other applications.

Women, if you do not wish to serve, return this summons to the Judge named on the reverse side as quickly as possible.

Men, if you are over 65 years of age and do not wish to serve, return this summons to the Judge named on the reverse side the same as other applications, before 12 noon Thursday preceeding your date of service. Give your date of birth in your request.

Non-Residents, if you are no longer a resident of Jackson County, Missouri, you are not eligible for jury service. Please let us know you have moved by returning this summons promptly giving your present address.

All persons duly summoned by mail as jurors may be attached for non-appearance and fined by the court for contempt.

We regret that we are unable to furnish parking for jurors.

Please bring this Summons with you when you appear at the Jury Assembly Room.

JURY COMSSR: 6500/ JURY COMSSR: 6500/1975

TABLE OF JURORS SUMMONED IN JACKSON COUNTY FOR
SERVICE IN KANSAS CITY - JANUARY, 1976

WEEK	JURORS SUMMONED		EXCUSED OR DECEASED	DEFERRED	ABSENT	APPEARED FOR SERVICE	
1/5/76	Male	247 (75.5%)	70	19	6	152	(92.7%)
	Female	80 (24.5%)	49	2	17	12	(7.3%)
	Total	327	119	21	23	164	
1/12/76	Male	260 (76.5%)	64	25	24	147	(88.6%)
	Female	80 (23.5%)	48	1	12	19	(11.4%)
	Total	340	112	26	36	166	
1/19/76	Male	245 (76.3%)	71	18	14	142	(87.1%)
	Female	76 (23.7%)	45	0	10	21	(12.9%)
	Total	321	116	18	24	163	
1/26/76	Male	234 (72.0%)	85	12	15	122	(81.9%)
	Female	91 (28.0%)	44	2	18	27	(18.1%)
	Total	325	129	14	33	149	
TOTALS FOR JANUARY 1976	Male	986 (75.1%)	290	74	59	563	(87.7%)
	Female	327 (24.9%)	186	5	57	79	(12.3%)
	Total	1,313	476	79	116	642	

Exhibit
"D"

TABLE OF JURORS SUMMONED IN JACKSON COUNTY FOR
SERVICE IN KANSAS CITY - FEBRUARY, 1976

WEEK OF		JURORS SUMMONED		EXCUSED DECEASED	DEFERRED	ABSENT	APPEARED FOR SERVICE	
2/2/76	Male	224	(70.9%)	64	26	16	118	(79.7%)
	Female	92	(29.1%)	46	4	12	30	(20.3%)
		<u>316</u>		<u>110</u>	<u>30</u>	<u>28</u>	<u>148</u>	
2/9/76	Male	243	(73.6%)	66	18	23	136	(82.9%)
	Female	87	(26.4%)	48	1	10	28	(17.1%)
	Total	<u>330</u>		<u>114</u>	<u>19</u>	<u>33</u>	<u>164</u>	
2/17/76	Male	120	(67.1%)	35	13	4	68	(81.0%)
	Female	59	(32.9%)	37	1	5	16	(19.0%)
	Total	<u>179</u>		<u>72</u>	<u>14</u>	<u>9</u>	<u>84</u>	
2/23/76	Male	235	(69.9%)	59	19	7	150	(84.7%)
	Female	101	(30.1%)	53	2	19	27	(15.3%)
	Total	<u>336</u>		<u>112</u>	<u>21</u>	<u>26</u>	<u>177</u>	
TOTALS FOR FEBRUARY 1976	Male	822	(70.8%)	224	76	50	472	(82.4%)
	Female	339	(29.2%)	184	8	46	101	(17.6%)
	Total	<u>1,161</u>		<u>408</u>	<u>84</u>	<u>96</u>	<u>573</u>	

TABULATION OF DATA OBTAINED FROM LISTS OF JURORS SUMMONED FOR MARCH, 1976.

Week
beginning:

March 1,
1976.

	Jurors Summoned	(%)	Excused	Deferred	Not Appearing	Appeared For Service	(%)
Female	90	(72.0%)	56	2	13	19	(13.1%)
Male	231	(28.0%)	64	21	20	126	(86.9%)
Total	321		120	23	33	145	

March 8,
1976.

Female	107	(31.9%)	64	2	9	32	(21.8%)
Male	228	(68.1%)	67	37	9	115	(78.2%)
Total	335		131	39	18	147	

March 15,
1976.

Female	107	(31.2%)	62	3	17	25	(15.2%)
Male	228	(68.8%)	58	23	15	140	(84.8%)
Total	343		120	26	32	165	

March 22,
1976.

Female	50	(26.0%)	27	1	8	14	(15.6%)
Male	142	(74.0%)	40	17	9	76	(84.8%)
Total	192		67	18	17	90	

March 29,
1976.

Female	99	(28.6%)	65	3	11	20	(12.5%)
Male	247	(71.4%)	70	27	10	140	(87.5%)
Total	346		135	30	21	160	

Total for
weeks of
March, 1976.

Female	453	(29.5%)	274	11	58	110	(17.0%)
Male	1,084	(70.5%)	299	125	63	597	(83.0%)
TOTAL	1,537		573	136	121	707	

TABLE OF JURORS SUMMONED FOR DUTY IN KANSAS CITY, APRIL, 1976.

week of		Summoned	Excused	Deferred	Not Appearing	Appeared For Service
4/5/76	Male	248 (71.1%)	65	29	15	139 (79.9%)
	Female	101 (28.9%)	51	1	14	35 (20.1%)
	Total	349	116	30	29	174
4/12/76	Male	254 (72.2%)	72	21	13	148 (83.1%)
	Female	98 (27.8%)	51	0	17	30 (16.9%)
	Total	352	123	21	30	178
4/19/76	Male	235 (70.6%)	67	21	12	135 (86.5%)
	Female	98 (29.4%)	54	2	21	21 (13.5%)
	Total	333	121	23	33	156
4/26/76	Male	121 (74.7%)	29	14	6	72 (90.0%)
	Female	41 (25.3%)	23	0	10	8 (10.0%)
	Total	162	52	14	16	80
TOTALS FOR APRIL, 1976	Male	858 (71.7%)	233	85	46	494 (84.0%)
	Female	338 (25.3%)	179	3	62	94 (16.0%)
	Total	1196	412	88	108	588

TABLE OF JURORS SUMMONED FOR DUTY IN KANSAS CITY, MAY, 1976

Week of		Summoned	(%)	Excused	Deferred	Not Appearing	Appeared for Service
5/3/76	Male	240	(72.7%)	60	17	15	148 (87.1%)
	Female	90	(27.3%)	48	2	18	22 (12.9%)
	Total	330		108	19	33	170
5/10/76	Male	236	(72.7%)	52	27	12	145 (89.0%)
	Female	89	(27.3%)	56	0	15	18 (11.0%)
	Total	325		108	27	27	163
5/17/76	Male	231	(72.6%)	56	29	12	134 (86.5%)
	Female	87	(27.4%)	52	2	12	21 (13.5%)
	Total	318		108	31	24	155
5/24/76	Male	239	(74.5%)	53	26	13	147 (85.5%)
	Female	82	(25.5%)	43	1	13	25 (14.5%)
	Total	321		96	27	26	172
Totals for May, 1976	Male	946	(73.3%)	221	99	52	574 (87.0%)
	Female	348	(26.7%)	199	5	58	86 (13.0%)
	Total	1,294		420	104	110	660

TABLE OF JURORS SUMMONED FOR DUTY IN KANSAS CITY, JUNE, 1976

Week of		Summoned	(%)	Excused	Deferred	Not Appearing	Appeared for Service
6/1/76	Male	217	(71.6)	54	29	12	122 (82.4%)
	Female	86	(28.4%)	42	4	14	26 (17.6%)
	Total	303		96	33	26	148
6/7/76	Male	255	(76.8%)	51	35	13	156 (86.2%)
	Female	77	(23.2%)	41	1	10	25 (13.8%)
	Total	332		92	36	23	181
6/14/76	Male	124	(70.1%)	25	18	5	76 (87.4%)
	Female	53	(29.9%)	33	1	8	11 (12.6%)
	Total	177		58	19	13	87
6/21/76	Male	254	(75.8%)	77	33	10	134 (92.4%)
	Female	81	(24.2%)	50	2	18	11 (7.6%)
	Total	335		127	35	28	145
6/28/76	Male	258	(75.4%)	60	40	19	139 (84.2%)
	Female	84	(24.6%)	47	0	11	26 (15.8%)
	Total	342		107	40	30	165
Totals for June, 1976							
	Male	1,108	(74.4%)	267	155	59	627 (86.4%)
	Female	381	(25.6%)	213	8	61	99 (13.6%)
	Total	1,489		480	163	120	726

TABLE OF JURORS SUMMONED FOR DUTY IN KANSAS CITY, JULY, 1976

Week of		Summoned	(%)	Excused	Deferred	Not Appearing	Appeared for Service
7/6/76	Male	241	(76.0%)	74	23	12	132 (89.2%)
	Female	76	(24.0%)	50	1	9	16 (10.8%)
	Total	317		124	24	21	148
7/12/76	Male	244	(73.5%)	79	27	12	126 (86.3%)
	Female	88	(26.5%)	57	1	10	20 (13.7%)
	Total	332		156	28	22	146
7/19/76	Male	216	(74.5%)	53	33	14	116 (87.9%)
	Female	74	(25.5%)	41	4	13	16 (12.1%)
	Total	290		94	37	27	132
7/26/76	Male	136	(70.8%)	39	17	5	75 (78.1%)
	Female	56	(29.2%)	28	2	5	21 (21.9%)
	Total	192		67	19	10	96
Totals for July, 1976							
	Male	837	(74.0%)	245	100	43	449 (86.0%)
	Female	294	(26.0%)	176	8	37	73 (14.0%)
	Total	1,131		421	108	80	522

General
Population
Characteristics

MISSOURI

1970
CENSUS OF
POPULATIONExhibit
"B"

Table 35. Age by Race and Sex, for Counties: 1970—Continued

(For minimum base for derived figures (percent, median, etc.) and meaning of symbols, see text)

Counties	1970 population							1960 population	1970 population							1960 population
	All races			White		Negro			All races			White		Negro		
	Total	Male	Female	Male	Female	Male	Female		Total	Male	Female	Male	Female	Male	Female	
HOWARD																
All ages.....	10 561	5 107	5 454	4 617	4 922	479	519	10 859	5 321	5 411	4 911	5 111	4 911	5 111		
Under 1 year.....	140	68	72	61	60	7	11	186	93	93	84	84	9	9		
1 year.....	144	72	72	65	66	6	6	190	95	95	84	84	6	6		
2 years.....	135	60	75	51	61	9	14	177	88	105	152	148	157	143		
3 years.....	136	68	68	59	55	9	13	187	93	105	152	148	157	143		
4 years.....	150	86	64	73	57	13	7	200	100	105	152	148	157	143		
5 years.....	163	86	77	70	69	15	8	198	95	105	152	148	157	143		
6 years.....	175	101	74	83	61	18	13	199	103	108	205	193	201	—		
7 years.....	177	97	80	80	66	17	13	202	101	108	215	191	214	190		
8 years.....	189	95	94	87	81	8	13	174	88	105	220	232	217	—		
9 years.....	173	87	86	73	77	14	9	169	88	105	220	232	217	—		
10 years.....	162	90	72	81	80	9	11	189	91	105	230	248	225	1		
11 years.....	189	102	87	87	79	14	8	177	91	105	230	248	225	1		
12 years.....	178	90	88	80	76	10	12	182	91	105	230	248	225	1		
13 years.....	190	96	94	80	79	16	15	182	91	105	230	248	225	1		
14 years.....	194	91	103	81	95	9	8	166	83	99	218	248	225	1		
15 years.....	197	101	96	86	86	15	9	148	74	99	218	248	225	1		
16 years.....	181	93	88	80	79	13	9	159	80	99	218	248	225	1		
17 years.....	182	101	81	88	69	13	12	152	77	99	218	248	225	1		
18 years.....	204	132	132	122	123	9	9	261	132	132	122	123	121	1		
19 years.....	291	134	157	127	148	7	8	261	132	132	122	123	121	1		
20 years.....	293	135	158	125	148	8	10	225	107	116	155	116	153	1		
21 years and over.....	6 638	3 122	3 516	2 878	3 207	240	301	6 875	3 207	3 668	2 878	3 207	240	301		
Under 5 years.....	705	354	351	309	299	44	51	940	465	475	410	405	55	60		
5 to 9 years.....	877	466	411	393	354	72	56	942	471	471	405	405	66	66		
10 to 14 years.....	933	469	464	409	409	58	54	896	437	437	371	371	66	66		
15 to 19 years.....	1 115	561	554	503	505	57	47	981	504	504	427	427	77	77		
20 to 24 years.....	963	493	470	467	437	23	31	721	361	361	300	300	61	61		
25 to 29 years.....	475	238	237	223	218	9	17	404	202	202	171	171	31	31		
30 to 34 years.....	421	200	221	182	192	17	28	310	155	155	130	130	25	25		
35 to 39 years.....	431	198	233	193	216	14	17	314	157	157	131	131	26	26		
40 to 44 years.....	505	263	242	244	219	19	23	354	177	177	147	147	30	30		
45 to 49 years.....	544	254	290	235	262	19	28	428	214	214	175	175	39	39		
50 to 54 years.....	526	253	273	236	248	17	24	424	212	212	173	173	39	39		
55 to 59 years.....	601	287	314	250	291	27	23	442	221	221	180	180	41	41		
60 to 64 years.....	593	285	308	246	283	19	25	418	209	209	169	169	40	40		
65 to 69 years.....	541	240	301	220	269	20	32	408	194	194	155	155	39	39		
70 to 74 years.....	475	216	259	188	231	28	28	315	157	157	129	129	28	28		
75 to 79 years.....	372	155	217	140	198	15	18	407	151	151	126	126	25	25		
80 to 84 years.....	267	100	167	87	157	13	10	213	84	84	69	69	15	15		
85 years and over.....	217	75	142	67	135	8	7	142	53	53	44	44	9	9		
Under 18 years.....	3 075	1 581	1 491	1 365	1 296	215	191	3 237	1 604	1 581	1 365	1 365	215	191		
65 years and over.....	2 232	961	1 271	864	1 162	97	107	2 255	944	944	780	780	97	107		
Median age.....	1 872	1 086	1 086	782	782	84	95	1 885	1 086	1 086	782	782	84	95		
Median age.....	32.5	29.4	35.4	30.0	36.1	21.8	30.6	35.3	34.3	35.0	35.5	33.0	35.5	32.5		
IRON																
All ages.....	9 529	4 642	4 887	4 604	4 857	24	18	8 041	4 558	4 483	4 137	4 346	4 137	4 346		
Under 1 year.....	180	91	89	91	88	—	—	145	73	72	64	64	9	9		
1 year.....	159	86	73	85	73	—	—	156	80	70	68	68	12	12		
2 years.....	154	83	71	82	70	1	1	152	78	70	68	68	10	10		
3 years.....	183	97	86	97	86	—	—	145	73	65	65	65	10	10		
4 years.....	175	95	80	93	80	2	—	140	71	61	59	59	11	11		
5 years.....	173	88	85	88	85	—	—	140	71	61	59	59	11	11		
6 years.....	191	91	100	91	99	—	—	156	78	80	68	68	12	12		
7 years.....	172	89	83	88	82	—	—	148	73	65	63	63	15	15		
8 years.....	194	105	89	105	89	—	—	157	81	63	61	61	16	16		
9 years.....	170	92	78	91	78	—	—	136	67	59	57	57	19	19		
10 years.....	189	99	90	99	89	—	—	158	81	68	61	61	18	18		
11 years.....	195	104	91	102	91	1	—	180	91	74	67	67	23	23		
12 years.....	175	91	84	90	83	1	—	183	91	74	67	67	23	23		
13 years.....	177	90	87	88	86	2	—	179	87	69	62	62	17	17		
14 years.....	195	93	102	93	100	—	—	156	78	61	54	54	21	21		
15 years.....	187	91	96	89	96	—	—	179	87	69	62	62	17	17		
16 years.....	184	110	74	107	74	3	—	160	78	53	46	46	22	22		
17 years.....	160	74	86	73	83	1	—	151	71	50	43	43	18	18		
18 years.....	115	67	48	66	47	1	—	135	63	46	39	39	13	13		
19 years.....	120	51	69	50	69	1	—	85	40	29	20	20	10	10		
20 years.....	100	39	61	39	61	—	—	76	33	23	16	16	17	17		
21 years and over.....	6 001	2 836	3 165	2 817	3 148	10	10	4 904	2 507	2 576	2 200	2 276	257	276		
Under 5 years.....	851	432	419	428	417	3	1	758	378	360	317	327	41	41		
5 to 9 years.....	920	465	455	463	433	—	—	737	368	339	317	327	41	41		
10 to 14 years.....	931	477	454	472	449	4	2	856	417	390	327	339	49	49		
15 to 19 years.....	746	393	353	385	349	7	4	710	350	325	283	297	37	37		
20 to 24 years.....	599	284	315	265	331	—	—	357	171	150	129	131	42	42		
25 to 29 years.....	606	299	307	299	308	—	—	354	171	150	129	131	42	42		
30 to 34 years.....	495	240	255	239	253	1	2	383	188	171	150	150	31	31		
35 to 39 years.....	454	212	242	208	241	—	—	417	199	179	158	158	41	41		
40 to 44 years.....	460	227	233	224	232	1	—	425	200	180	158	158	42	42		
45 to 49 years.....	436	213	223	211	222	2	—	502	239	217	187	187	52	52		
50 to 54 years.....	505	242	263	239	262	2	—	490	240	218	189	189	51	51		
55 to 59 years.....	562	266	296	266	293	—	—	401	191	165	142	142	49	49		
60 to 64 years.....	538	265	273	260	271	—	—	409	191	165	142	142	49	49		
65 to 69 years.....	454	212	242	208	241	—	—	415	199	179	158	158	41	41		
70 to 74 years.....	347	174	173	173	173	1	—	340	167	147	126	126	21	21		
75 to 79 years.....	262	108	154	108	153	—	—	241	105	113	93	93	12	12		
80 to 84 years.....	198	56	142	55	142	—	—	150	45	53	38	38	7	7		
85 years and over.....	183	62	121	62	121	—	—	96	31	37	26	26	10	10		
Under 18 years.....	3 193	1 649	1 544	1 532	1 532	12	7	2 841	1 407	1 370	1 200	1 200	171	171		
65 years and over.....	1 721	739	988	733	985	4	2	1 487	724	668	585	585	83	83		
Median age.....	31.4	29.8	32.8	29.8	32.8	18.6	32.5	33.2	29.1	27.8	30.5	28.9	32.1	24.3		
JACKSON																
All ages.....	9 529	4 642	4 887	4 604	4 857	24	18	8 041	4 558	4 483	4 137	4 346	4 137	4 346		
Under 1 year.....	180	91	89	91	88	—	—	145	73	72	64	64	9	9		
1 year.....	159	86	73	85	73	—	—	156	80	70	68	68	12	12		
2 years.....	154	83	71	82	70	1	1	152	78	70	68	68	10	</		

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE
UNITED STATES

TERM, 1978

No. 77-7012

CLIFFORD R. COMBS.

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys For Respondent

DANIEL F. LYMAN
Assistant Attorney General
of Counsel

TABLE OF CASES

State v. Combs, 564 S.W.2d 328 (Mo.Ct.App. at K.C. 1978);
State v. Duren, 556 S.W.2d 11 (Mo. banc 1977);
Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d
690 (1975);

Article I, §22(b), Missouri Constitution

Article XII, §41, Louisiana Constitution (since repealed)

Section 494.010, RSMo. 1969

Section 494.020, RSMo. 1969, as amended

Section 494.031, RSMo. 1969, as amended

Section 497.130, RSMo. 1969, as amended

Chapter 497, RSMo. 1969, as amended

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OPINION BELOW

The opinion and decision of the Missouri Court of Appeals is reported at 564 S.W.2d 328 (Mo.Ct.App. at K.C. 1978). A copy of the opinion appears as petitioner's Appendix A.

JURISDICTION

On February 27, 1978, the Missouri Court of Appeals issued its opinion affirming the petitioner's conviction for one count of burglary second degree, and one count of stealing. Thereafter, on March 14, 1978, the petitioner filed a timely motion for rehearing. On April 3, 1978, the petitioner's motion for rehearing was overruled. Thereafter, an application to transfer the cause to the Missouri Supreme Court was filed on April 18, 1978, which application was denied on May 9, 1978. On June 30, 1978, the petitioner filed with this Court a petition for Writ of Certiorari to the Missouri Supreme Court. On August 15, 1978, the respondent was

directed to file a response in the instant case.

The jurisdiction of the Court is invoked under Title 28, United States Code, §1257(3).

QUESTION PRESENTED

WHETHER THE PETITIONER WAS DENIED THE RIGHT TO A FAIR TRIAL BY VIRTUE OF THE PROVISION OF THE MISSOURI CONSTITUTION WHICH PERMITS WOMEN TO DECLINE JURY SERVICE?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, Article I, §22(b), of the Missouri Constitution, §494.020, §494.031, and Chapter 497 of the Missouri Revised Statutes, 1969 as amended. The Missouri constitutional and statutory provisions mentioned above are set out in full in the respondent's Appendix A.

STATEMENT

In December of 1976 the petitioner, Clifford R. Combs, was tried for, and convicted of, one count of burglary second degree and one count of stealing. Prior to trial, the petitioner filed a motion to quash the jury panel "that may be produced as prospective jurors", claiming that Article I, §22(b) of the Missouri Constitution operates to deny the petitioner a jury panel selected from a fair cross-section of the community. In support of his motion, the petitioner introduced Defendant's Exhibit 1 (a copy of which appears in petitioner's Appendix B). Defendant's Exhibit 1 is a stipulation entered into by the petitioner and the State of Missouri.

Briefly, the stipulation outlines the process by which jury wheels in Jackson County, Missouri are created, and prospective jurors are summoned. In paragraph 3, the stipulation presents a statistical analysis of the questionnaires returned by women in the process of assembling the 1976 jury wheel for Jackson County, Missouri.

By way of the stipulation, the petitioner sought to introduce evidence that women comprise 54.4% of the population of Jackson County, twenty-one years of age and older, that the petitioner's jury venire of twenty-four contained six women, and that approximately 29.1% of the 1976 Jackson County jury wheel was comprised of females. Additionally, the petitioner introduced evidence that women accounted for the following percentages of those who were summoned and appeared for jury service in the seven months preceding the petitioner's trial; January of 1976 - 12.3%; February of 1976 - 17.6%; March of 1976 - 17.0%; April of 1976 - 16.0%; May of 1976 - 13.0%; June of 1976 - 13.6%; and July of 1976 - 14.0%. Finally, the petitioner introduced evidence of a statistical analysis of those questionnaires which were mailed to voters for the purpose of assembling a 1976 jury wheel for Jackson County. The results of that analysis concluded that, of 30,165 questionnaires mailed to women, "[q]uestionnaires indicating that women declined to serve for no other apparent reason than the female exemption" were returned by 21,884 women.

Upon consideration of the petitioner's motion to quash the prospective jury panel, and the stipulation introduced in support thereof, the trial court denied the petitioner's motion.

Following the petitioner's trial and conviction, an appeal was taken to the Missouri Court of Appeals. In essence, the basis of the petitioner's argument on appeal was identical to that now advanced by the petitioner; that the exemption permitted by Article I, §22(b) of the Missouri Constitution operated to deny the petitioner the right to trial by a jury representing a fair cross-section of the community.

On February 27, 1978 the Missouri Court of Appeals affirmed the petitioner's conviction in an opinion contained in 564 S.W.2d 328. The court briefly disposed of the petitioner's constitutional arguments, citing the Missouri Supreme Court decision in State v. Duren, 556 S.W.2d 11 (Mo. banc 1977), a case in which this Court will hear argument during the October Term on a Writ of Certiorari to the Missouri Supreme Court. The petitioner's motion for rehearing was denied by the Court of Appeals on April 3, 1978, while his motion to transfer was denied by the Missouri Supreme Court on May 9, 1978.

In order to fully understand the question presented by this case, it is necessary to consider the jury selection system which is employed in Jackson County, Missouri. That system is mandated by §494.031, §494.020, and Chapter 497 of the Revised Statutes of Missouri, 1969 as amended and Article I, §22(b) of the Missouri Constitution. Each of these provisions appears in respondent's Appendix A.

The jury selection system in Jackson County begins with that county's voter registration list. From that list, the jury commissioner selects, at random and by computer, approximately 65,000 names. A questionnaire is then sent to each individual selected. A copy of that questionnaire appears in §497.130, RSMo., 1969 as amended, respondent's Appendix A. Among other things, the questionnaire notifies women of their right to be excused from jury duty. When the questionnaires are returned, the jury commissioner eliminates the names of all individuals whose questionnaire indicates that he has exercised his right to be excused, or that he is unqualified to serve as a juror. *

* In order to promote an orderly and efficient judicial system, certain individuals are excluded from jury service by §494.020, RSMo. 1969 as amended. For example, licensed attorneys and those unable to understand the English language may not serve on juries in Missouri. Section 494.031, RSMo., 1969 as amended, on the other hand, allows certain individuals to be excused from jury duty if they take a timely application to the court. For example, persons over 65 years of age, doctors of medicine, school teachers, government workers, and clergy may apply to be excused. Also, Article I, §22(b) of the Missouri Constitution mandates that the court shall excuse any woman who requests exemption before she is sworn.

The remaining pool of names is then entered into a computer, and nearly 28,000 names are randomly selected for the master jury wheel. If an individual fails to return the questionnaire, that individual's name is automatically included in the pool from which the master jury wheel is selected. In Jackson County, a new jury wheel is prepared each year.

Individuals are periodically selected from the master jury wheel by computer to make up the general jury panel for all civil and criminal divisions of the Jackson County Circuit Court. By random selection from the jury wheel, individuals are summoned to jury service. The summonses include a notification to women that they have a right to be excused from jury duty. After receiving a summons, an individual is given the opportunity to present to the circuit court reasons why he or she would be unable to serve as a juror. All jurors who are not excused should appear in the circuit court for jury duty. If a woman does not appear, it is assumed that she has exercised her right not to serve. Venire panels are then randomly selected from the individuals who have appeared for jury duty, and a petit jury is selected from the venire panel. In the petitioner's case, the record indicates that his jury venire of twenty-four contained six women, while his petit jury of twelve included one woman.

ARGUMENT

The decision of the Missouri Court of Appeals in State of Missouri v. Clifford R. Combs is not in conflict with this Court's decision in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), in that Article I, §22(b) of the Missouri Constitution does not operate to exclude women from jury service.

In Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) (hereinafter, "Taylor"), this Court held that the jury selection system employed by the State of Louisiana deprived criminal defendants of their right to an impartial trial.

Louisiana Constitutional Article XII, §41 (since repealed) sets out the constitutionally offensive procedure:

"The legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no women shall be drawn for jury service unless she shall have previously filed with the clerk of the district court a written declaration of her desire to be subject to such service. . . ."

This Court concluded that the above-quoted provision operated to systematically exclude women from jury service, and therefore, deprived criminal defendants of a jury composed of a fair cross-section of the community.

Relying on the decision in Taylor, the petitioner argues that he too has been deprived of his rights to a fair trial because Article I, §22(b) of the Missouri Constitution allows women to avoid jury duty by requesting an exemption. The Louisiana constitutional provision cited, and Article I, §22(b) of the Missouri Constitution, however, are readily distinguishable. Under the constitutionally offensive Louisiana system, a woman would not have been eligible for jury service unless she were to have taken affirmative steps to inform the court of her desire to serve as a juror. In Missouri, however, women are automatically included in the jury list. They are excused from jury service only when they take affirmative steps to notify the courts that they do not wish to serve. The Missouri system of jury selection, therefore, does not exclude women. It merely permits women to actively seek exemption from jury service. This Court's opinion in Taylor stated ". . . jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." (Emphasis added)

Taylor, supra, at 538. While the petitioner relies on the above-quoted language from Taylor, it is evident that Missouri does not use the force of its law to exclude women from juries. On the contrary, Missouri merely permits women, through Article I, §22(b) of the Missouri Constitution, to exempt themselves from juries. Simply stated, Missouri excludes no women from jury service on the basis of their gender. The distinction between Louisiana's "opt-on" system and Missouri's "opt-off" system is crucial and dispositive.

Taylor also indicates that a defendant must show that the jury wheels from which juries are chosen fail to represent a cross-section of the community. The petitioner has asserted that he has met the burden of proof imposed by Taylor. The jury statistics in Taylor, however, outline a factual framework which is radically different from that with which we deal in this cause. In Taylor, 53% of the persons eligible for jury service were female, while no more than 10% of the persons on the jury wheel involved were women. In marked contrast, while in Jackson County the petitioner suggests that 54.4% of the persons eligible for jury service are women, the 1976 jury wheel list was comprised of slightly less than 29.1% females. Additionally, in Taylor there were no females in the 175 person jury venire. In the present case, there were 6 women on the petitioner's jury panel of 24, and one woman on his petit jury. It thus seems clear that this Court in Taylor was confronted by a Louisiana jury selection system which departed significantly from that which Missouri employs, and was confronted with lopsided statistics which bear no relationship to those produced by the petitioner in this case.

II.

This case is plagued with evidentiary problems which will prevent this Court from reaching the question of whether the defendant's right to a fair trial has been denied.

The petitioner alleges that the exemption from jury service permitted females in Missouri causes gross under-representation of women on jury panels. The record in this case, however, fails to demonstrate, in a convincing fashion, any relationship between Article I, §22(b), and the alleged under-representation of women on juries in Jackson County.

First, the petitioner has failed to present eligible population statistics for the year of his trial. The stipulation introduced by the petitioner in support of his motion to quash included 1970 United States Census figures which show that Jackson County had approximately 407,000 inhabitants twenty-one years of age or older. Approximately 54% of those inhabitants were women. The annual Jackson County jury selection process, however, begins with a current voter registration list. No proof has been made that the sexes register to vote in direct relation to their numbers, or that there was not a significant change in the population makeup of Jackson County, Missouri, between 1970 and 1976 when the petitioner's jury was selected. As stated by the Missouri Supreme Court in State v. Duren, 556 S.W.2d 11 (Mo. banc 1977):

"All of this suggests that statistics of current 'eligible population' referred to in Alexander v. Louisiana, supra, not six year old gross population figures, provide the proper starting point." State v. Duren, supra, at 16.

Finally, certain other statistics presented by the petitioner in support of his argument are unpersuasive.

Specifically, the stipulation which the petitioner incorporates in his Appendix B refers, in paragraph 3, to certain data compiled on the questionnaires sent to potential jury members from Jackson County during 1976. The petitioner contends that these statistics demonstrate that 72.6% of the 30,165 women receiving the questionnaire opted-off jury service merely because, as females, they were permitted to do so by Missouri law. This conclusion remains unsupported.

The questionnaire which is the subject of the petitioner's stipulation was sent to prospective jurors in Jackson County, and filled out and returned by them in accordance with §497.130, RSMo., 1969 as amended. The petitioner's statistics indicate that 21,884 questionnaires (72.6% of those mailed to females) were returned "indicating that the women declined to serve for no other apparent reason than the female exemption." (Emphasis added, petitioner's Appendix B, stipulation, paragraph 3).

The last paragraph of the questionnaire reads:

"TO WOMEN:

"The constitution permits women to elect to serve or not to serve as jury women. Any woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commissioner at once. It will not be necessary to answer the other questions.

I elect not to perform jury service.

.....
Signature"

The sentence, "[i]t will not be necessary to answer the other questions" suggests that unascertainable numbers of the 21,884 women who returned questionnaires having signed

at the bottom of the paragraph quoted above did simply that; signed at the bottom of the paragraph and declined to fill out the rest of the questionnaire. The petitioner attempts to suggest that all questionnaires so returned were the questionnaires of women who were only subject to exemption from jury service by virtue of their gender. This suggestion is unsubstantiated. There is no proof offered that every woman who chose to simply sign her name was without the requisite qualifications for any number of other possible exemptions. If, for example, a woman was also a lawyer or a physician, the exemption she would have had for her profession would not have been noted on the questionnaire if she had merely expedited matters by signing the last paragraph. As a result, an indeterminate number of women who merely signed and returned the questionnaire might have had a basis for exemption for all those reasons listed in questions 3, 4, 5, 6, 8, 9, 11, and 12 of the questionnaire.

From the evidence produced by the petitioner, it has not been proved that all of those women returning a questionnaire who signed only the last paragraph were incapable of having themselves excluded on grounds other than gender and Article I, §22(b) of the Missouri Constitution. As a result, the petitioner has failed to prove that his jury was illegally constituted by virtue of Missouri's female exemption provisions.

Even if every questionnaire returned by a female was completely filled out, and if every one revealed no other possible basis for an exemption other than gender, that fact alone would still not demonstrate that those women would not have been exempted from jury service for other reasons recognized by Missouri, and unchallenged by the petitioner.

For instance, under §494.031, RSMo., 1969 as amended, a woman might have had an exemption for being an officer or

employee of the Executive, Legislative or Judicial branches of a federal, state, or county government. Likewise, if her jury service would be adverse to the public interest, or if it would impose an undue hardship on her, she would have received an exemption. Under §494.020, RSMo., 1969 as amended, a woman whose questionnaire when completely filled out revealed no apparent basis for an exemption, other than her gender, would nonetheless have been excluded had she been convicted of a felony, been unable to read, speak or write English, or not been correctly drawn. Similarly, §494.010, RSMo., 1969 as amended, demands that jurors be over twenty-one years of age, sober, intelligent citizens of the state, and residents of the city or county served by the jury.

All of the exemptions mentioned above might have been applicable to a woman whose questionnaire indicated only that she was a female and that none of the other exemptions specifically listed on the face of the questionnaire was applicable.

In conclusion, the petitioner's bare recital of the number of women who returned questionnaires having signed only the female exemption paragraph is not convincing. An unascertained number of those questionnaires could have come from women who could, on the face of the questionnaire, have received exemptions on another basis, or who, after having filled out the entire questionnaire, might nonetheless have received exemptions under §494.031, §494.020 or §494.010, RSMo., 1969 as amended.

It should be noted that in Taylor the parties stipulated that "the discrepancy between females eligible for jury service and those actually included in the venire was the

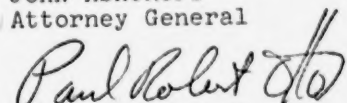
result of the operation of the Louisiana constitution".
Taylor, supra, at 524. The parties in the present action
have entered to no such stipulation. As a result, the
petitioner has failed to demonstrate that Article I, §22(b)
of the Missouri Constitution operates to deny him his rights
under the Sixth and Fourteenth Amendments to the United
States Constitution.

CONCLUSION

WHEREFORE, the respondent respectfully requests that
this Court deny the petitioner's request for a writ of
certiorari to the Missouri Supreme Court.

Respectfully submitted,

JOHN ASHCROFT
Attorney General


PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys For Respondent

DANIEL F. LYMAN
Assistant Attorney General
of Counsel.